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Supreme Court of the United States

October Term, 1936.

No. 716.

GREAT LAKES TRANSIT CORPORATION,
Petitioner,

against

INTERSTATE STEAMSHIP COMPANY and ATLANTIC MUTUAL INSURANCE COMPANY, *ET AL.*, Intervening Underwriters.

BRIEF FOR PETITIONER.

This case comes before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, granted March 8, 1937 (R. 142).

Petitioner sought to review the decree of the Circuit Court of Appeals made on June 5, 1936 (R. 123) affirming the interlocutory decree of the United States District Court for the Northern District of Ohio, Eastern Division, in admiralty, made on July 27, 1934, adjudging first, that the petitioner's Steamer "George D. Dixon", and the Interstate Steamship Company's Steamer "Willis L. King", were both in fault for a collision in the St. Clair River on August 11, 1933, and second, that the Atlantic Mutual Insurance Company and other intervening underwriters having paid and agreed to pay petitioner, under insurance policies which they had issued, the amount of cargo loss and damage

(less a deductible average of $1000) arising out of such collision (R. 53), were entitled to recover back from Petitioner a moiety of such damages (R. 111-12). In allowing the writ this Court limited its review to the second question referred to above (R. 142).

Opinions Below.

The opinions of the District Court, three in number, two having to do with the question to be reviewed (R. 104-108), are not officially reported. The opinion of the Circuit Court of Appeals (R. 123-34) is officially reported as "Great Lakes Transit Corporation v. Interstate Steamship Company (Milko, *et al.* interveners), 86 F. (2d) 740, Advance Sheets, Feb. 1, 1937." There was no opinion on the application for reargument (R. 142).

Nature of the Proceedings.

The Interstate Steamship Company filed its libel against Petitioner *in personam* in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioner, as owner of the "Dixon" and as carrier and/or bailee of the cargo laden thereon, filed its libel *in rem* against the Steamer "Willis L. King" and *in personam* against the Interstate Steamship company (R. 10-15). The Interstate Steamship Company, under the 56th Rule in Admiralty, brought petitioner into the suit which it had brought as owner of the "Dixon" and as carrier and/or bailee of cargo, to answer, as *owner*, petitioner's claim for cargo damage (R. 20-23). The requisite answers were filed, the suits were consolidated, and the decision was mutual

fault. After the decision the Atlantic Mutual Insurance Company intervened in the consolidated cause, claiming to be subrogated to the rights of owners, shippers and consignees of cargo on the "Dixon" (R. 45), asking that the Interstate Steamship Company and Great Lakes Transit Corporation answer its petition, and praying for a recovery in full from the "King" of the cargo loss and damage which it had then paid and would thereafter pay (R. 46). The Interstate Steamship Company answered the petition, setting up the decision of mutual fault, and praying that its rights be preserved (R. 101-4). The Transit Corporation also answered, denying that the Atlantic Mutual Insurance Company was subrogated to the rights of cargo owners (R. 97, 98), and alleging that if the collision was due to mutual fault, the cargo damages should be equally divided and a full recovery against the "King" would be contrary to the rights of the parties (R. 100-101). The question presented on this review arises out of the issues made by the intervening petition of underwriters and the answer of the Transit Corporation thereto.

The Atlantic Mutual Insurance Company had insured 30% of the risk with respect to cargo, and it was stipulated that its petition should stand as the petition of underwriters, fourteen in number, insuring the remaining 70% (R. 46-9).

Jurisdiction.

The jurisdiction of this Court is based on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347) and on Article III, Section 2, Clause I of the Constitution of the United States.

The Issues Involved.

On the question here to be reviewed the only issues presented by the pleadings and in the argument in the District Court were first, whether intervening underwriters were subrogated to the rights of cargo owners whose property had been lost and damaged, and second, as to whether, if subrogated, they were entitled to recover cargo damage *in full* from the Steamer "*King*" and her owner. The same questions are here presented and, although the issue is not tendered by the intervening petition or presented by the answers thereto, in addition the question as to the correctness of the decree that intervening underwriters can *recover back* from petitioner a moiety of the moneys they have paid it with respect to cargo loss and damage.

Statement of the Stipulated Facts and the History of the So-called Marine Insurance Clauses Contained in Petitioner's Tariffs.

Petitioner is a common carrier by water under the jurisdiction of the Interstate Commerce Commission, participating in through rates with rail and canal carriers and issuing the "Uniform Bill of Lading". Its freight vessels, some twenty in number, engaged in carrying cargoes of miscellaneous freight, are known as package freighters, as differentiated from bulk freight carriers which carry iron ore, grain, coal, stone and other like commodities. On each trip each vessel carries many hundreds of consignments of goods, the transportation usually being initiated or terminated, and in many cases both initiated and terminated, by rail carriers. As long ago as 1907 owners of package

freighters sought to take out a blanket insurance coverage on all cargo carried and include the cost of such insurance in the freight rate. In 1908 the Interstate Commerce Commission had for consideration the propriety of advance in freight rates on the Great Lakes to cover the increase cost of the so-called "insured bills of lading."

Wyman, Partridge, etc. vs. Boston & Maine R. R., (XIII I. C. C. Rep. 258).

The Commission had the following to say with respect to the practice proposed:

> "If the shipper obtained through this insurance taken out by the carrier proper protection without material increase of expense to him, we think the present arrangement would be better than the old practice under which each shipper procured his own insurance." (262.)

The Commission then decided that the end to be attained—protection of the shipper—could best be attained by the carrier assuming full liability for losses due to perils of the seas or other causes and not by direct insurance on cargo, stating:

> "When the shipper himself effects his own marine insurance he receives a policy which states the terms and conditions upon which that insurance is placed. If a loss is not paid he has a contract upon which he can bring suit and he may select such insurance company that this suit can be brought in the state of his residence.
>
> "There is the greatest uncertainty just what protection the shipper secures under the arrangement which is attacked by this proceeding. The rate is a joint through rate applicable over both the rail and the water line. Undoubtedly, these carriers might, if they saw fit, issue bills of lading which would make them responsible for loss by

peril of the sea. Under such a contract for transportation the carrier would stand responsible for a loss upon the water, *would thereby acquire an insurable interest in the goods as against such loss, and might take out marine insurance for its own benefit.* In case of loss it would be liable to the shipper and would look for indemnity to the insurance company." (Italics ours.) (262.)

"But such is not the contract which these defendants make with their shippers. As already said, they may exempt themselves from these perils of the sea which are not due to their own negligence, and without exception they do this by the terms of the bills of lading which are issued. They are not, therefore, liable as common carriers for loss upon the water not due to the negligence of the water carrier. What they undertake to do is to procure insurance which shall indemnify *not the carrier but the shipper* against such loss. (Italics ours.)

"The testimony does not show clearly what contract of insurance is executed. It seems to be a general policy upon the cargo for the benefit of whosoever may be interested. The name of no shipper is specified, the value of no invoice is known, the value of the entire cargo is not known and cannot be known. The shipper has no information as to the company in which the insurance has been placed, nor as to the nature of the policy which has been taken out, nor as to the conditions which he must perform in order to perfect his claim in the event of loss. If loss occurs he knows not whom to sue nor where to sue, and the company may be one upon whom no service can be obtained without going into some foreign jurisdiction at great expense.

"We do not feel that shippers should be forced to rely upon this sort of an undertaking for protection. Without doubt these carriers might, if they saw fit, as already suggested, contract to indemnify the shipper against loss due to perils of the sea. *In such event the carrier itself would become the insurer and the shipper would require no*

additional insurance. It would be entirely immaterial to the shipper whether the carrier did or did not protect itself by insurance against possible loss. This kind of rate these carriers might have established and they might with propriety have made a somewhat higher charge than was imposed under the old tariff where the shipper himself was obliged to incur the expense of this marine insurance." (Italics ours.) (263.)

In conclusion the Commission stated:

"An order will then be issued putting in the reduced rates above named, unless the defendants have previously tendered a contract of shipment under which the shipper receives the same protection which he has formerly had under his policy of marine insurance, and make the necessary changes in their tariffs, if any are required." (265.)

The case again came before the Commission in March 1909 (XV, I. C. C. 577). In pursuance of the suggestion made in the earlier case the carriers had submitted certain tariff and bill of lading provisions, which were the subject of consideration. The Commission decided that there should be incorporated in the tariffs issued for lake and rail movement, the following clause:

"While shipments carried under this tariff are water borne at and between lake ports on the vessels of a lake line party hereto, the lake carrier and the rail carrier delivering the property to the lake carrier jointly and severally assume liability for loss or damage to said shipments caused by marine perils, to wit, of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or marines, and all other perils or misfortunes that have or shall come to the hurt or damage of said property or any part thereof, including general average charges and expenses for which the owner may under

> the maritime law be chargeable, but excluding the risks of riots, war, or insurrection; any loss from said marine perils for which the lake line or the rail line is liable hereunder to be paid sixty days after proof of loss and proof of interest in said property are furnished said company." (581.)

By Sections (a), (b), and (c) of Section 9 of the Uniform Bill of Lading, (R. 75-76) a water carrier is given the benefit of the Limited Liability Acts (46 U. S. C., Sec. 182-188), and of the Harter Act (46 U. S. C., Secs. 190-5) whereby a vessel owner using due diligence to make his vessel seaworthy is not responsible for faults or errors in navigation or management of the vessel, and is exempted from liability for damage due to latent defects, etc. In order to make effective its directions with respect to tariffs of lake carriers issuing insured bills of lading, the Commission directed that a new clause should be added to the uniform bill of lading. This clause, in the same verbiage as directed by the Commission in 1909 (XV, I. C. C. at 582), is now Section 9 (e), and is as follows:

> "If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading." (R. 76-7.)

In 1910 the *Wyman, Partridge* case came before the Commission for the third time (XIX, I. C. C. 551). Wyman, Partridge & Co. sought reparation in the amount of the premiums they had paid directly for cargo insurance during the lake navigation season of

1907, claiming such insurance was necessary for the reason that the cargo policies taken out by the lake carriers (the cost of which was included in the freight rate), did not afford adequate protection. Reparation was granted.

The lost and damaged cargo on the "Dixon" was moving under ten tariffs, four of which (C3, C7, C10 and C11), (R. 79, 82, 84, 85),—three headed "Marine Insurance" and one headed "Governing Marine Insurance on Rail and Lake traffic"—contained the identical words of the clause quoted above, directed by the *Wyman, Partridge* case. Four more (C2, C4, C5 and C8) (R. 78-80, 82) are in legal effect the same although not in identical verbiage and not containing the provision "that the lake carrier and the rail carrier delivering the property to the lake carrier jointly assume liability" etc. One, of the four last mentioned, (C4), was a joint canal and lake tariff in which both the canal and the lake carriers assumed liability. Since the Carmack amendment (49 U. S. Code, Sec. 20, sub. 11), the recital that the rail carrier, (if the initial carrier) delivering the property assumed liability, would be surplusage. The two remaining tariffs (C6 and C9) (R. 81, 83) provide that the property moving under rates, which include marine insurance, "is insured against the perils of the seas," etc. Giving effect to the *Wyman, Partridge* case (XIII, I. C. C. 258) under the two tariffs last mentioned the petitioner itself was the insurer. Neither the District Court nor the Circuit Court of Appeals nor intervening underwriters have distinguished between the tariffs referred to above. Each Court held that by tariff and bill of lading provisions petitioner waived the saving provisions of the Harter

Act and all other defenses, and assumed full liability to cargo owners for cargo loss and damage.

Petitioner having, as stated in the first *Wyman, Partridge* case (XIII, I. C. C. 258, at 262), an "insurable interest in the goods", took out marine insurance "*for its own benefit.*" It procured at a cost of approximately $25,000 from the Atlantic Mutual Insurance Company and other interventing underwriters, insurance upon its carrier's liability aggregating $1,100,000.

Excess insurance was also permitted by the policies. (R. 66.) The policy provisions are set forth in a rider designated as "First Interest" (R. 63-68), the last clause of which provides as follows:

> "The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived." (R. 67.)

By this form of special rider, intervening underwriters agreed to and did:

> "Insure, lost or not lost, Great Lakes Transit Corporation for account of whom it may concern. Loss, if any, payable to Great Lakes Transit Corporation or order. At and from April 15, 1933 to midnight (Chicago time) December 12, 1933 • • • on cargo of any kind owned by the Assured and on the *Assured's liability to others in respect of cargo of any kind covering* same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases • • • and under and/or on deck on board of the Assured's steamer • • • 'George D. Dixon' • • • the Assured *taking upon themselves* as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo

against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defects in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo and undertake to *indemnify and hold harmless the said Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the *Assured* may be held by the owners thereof, *under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average.* • • • *There shall, however, be deducted from the aggregate of all claims on each eastbound or westbound passage, the sum of $1,000.00.*" (Italics ours). (R. 63-6.)

It will be noted that the only direct cargo coverage is on cargo "of any kind owned by the assured" (Great Lakes Transit Corporation). Petitioner could not be liable to itself and this direct coverage was necessary if it was carrying in its own vessels any cargo which it owned. The remaining portions of the covering clause have solely to do with insurer's "*liability to others in respect to cargo of any kind*" (R. 63).

The policy recognizes that it is not the ordinary water carrier's liability with statutory and contract exemptions, but that the assured has waived all its defenses and is "taking upon themselves as to said cargo or parts thereof all the risks, perils and liability which by law a common carrier, by land or water, assumes, and also the *insurance* of said cargo against the perils of the seas, lakes" etc. • • • and "the said assurers agree and undertake to indemnify and hold

harmless the said assured (Transit Corporation) against • • • damage to or loss of such cargo from any and all such risks • • • to the extent which the Assured may be held by the owners thereof under any liability the assured (Transit Corporation) shall have assumed as common carriers, *insurers* or otherwise" (R. 64, 65).

After the collision a large number of claims for cargo loss and damage were presented by cargo owners to petitioner *as carrier* (R. 52). Petitioner paid such claims on various dates subsequent to the collision and prior to January 22, 1934, in the total amount of $21,987.57 (R. 53). All of such claims were treated in the same manner, without differentiation by reason of any varianee in the wording of the tariff provisions under which the respective consignments were carried. All of such payments were made by drafts on appellant to the cargo owners, or order, stating the amount was "in full settlement of your claim" (R. 53, 87).

The total amount of allowable cargo claims had not been ascertained at the time the stipulation was signed on account of the fact that in due course many of such claims were presented in the first instance to originating carriers before being forwarded to petitioner, and considerable delay resulted before all claims were finally received, examined and approved.

However, on January 22, 1934, average adjusters prepared a partial statement of loss on cargo, including the amount of claims paid by appellant up to that time, plus the expenses of the adjusters and less the sum of $1000.00 deductible average provided in said policy (R. 53, 94-96). They then presented claim to in-

tervening underwriters for the net amount so determined, *the amount of the deductible average being borne by petitioner* (R. 53). The several underwriters reimbursed petitioner for such net amounts by checks issued on January 27, 1934, and subsequent dates (R. 53). It was stipulated that when further claims are received, approved and paid by petitioner a further statement or statements will be made and payment will be made in like manner to petitioner by underwriters including cargo's proportion of General Average and like expenses (R. 54). This was done.

These payments by petitioner and reimbursement by underwriters were made in due and ordinary course, as is shown by paragraph "7" of the stipulation (R. 54-5). In that paragraph it was stipulated that policies in substantially the same form as those here involved, issued by Atlantic Mutual and other underwriters to petitioner, were in effect for each year from 1928 to 1933 inclusive, and during all of these years general cargoes were carried and transported by petitioner pursuant to bill of lading and tariff provisions having the same legal force and effect as those here involved. During this period numerous cases of loss of and damage to such cargoes had arisen as the result of perils of the sea and in each case the procedure adopted and carried out with respect thereto, was the same as the procedure set forth above with respect to the *Dixon's* cargo, to wit, petitioner paid the losses and was reimbursed for such payments by underwriters.

Effect of the decree that intervening underwriters are entitled to recover back from petitioners a moiety of the amount they had theretofore paid with respect to cargo loss or damage.

If, as held by the Courts below, intervening underwriters, through subrogation to the rights of cargo owners can recover back from petitioner the moiety of cargo loss and damage for which it was held liable on account of the Dixon being guilty of fault which contributed to the collision, then they can recover back—or need not have paid—for cargo loss, however caused. Petitioner assumed liability by its tariffs for "marine perils, to wit, of the seas and lakes, fire, *collision*, stranding, etc." Collision is not and cannot be differentiated from the other perils enumerated. It follows therefore that the policies for which petitioner paid a premium of approximately $25,000 were worthless, other than as insurance on cargo *owned* by the petitioner. If it be suggested that the insurance protected cargo owners against petitioner's insolvency, the reply is that the initial carrier, liable under the Carmack Amendment, and the rail carrier delivering to petitioner would also have to be insolvent, since cargo owners could recover from either of these carriers and after payment made, subrogated underwriters would have the same right. Surely insolvency is a contingency too remote to even consider as a reason for insurance of this character.

If the decree directing a *recovery back* be correct, underwriters can likewise recover back the moneys they have paid petitioner to reimburse it for its payments to cargo owners for other cargo loss and damage during the five years (1928 to 1933 inclusive) in which they

have issued to petitioner policies in substantially the same form as those now under consideration (R. 54). Why the useless formality of paying at all?

Argument.

Petitioner submits:

1. The insurance policies were contracts between intervening underwriters and petitioner under which petitioner was entitled to be indemnified for the liability which it had assumed under bill of lading and tariff provisions, with the result that

(a) Intervening underwriters having insured petitioner's liability were subrogated to the rights of petitioner and not to the rights of cargo owners, and as thus subrogated they are entitled to recover payments of the cargo damage to the extent they have reimbursed petitioner therefor and no more; and

(b) Even though the policy be construed as a coverage on cargo alone, petitioner, the named assured, having an insurable interest therein, was entitled to the benefit thereof; and intervening underwriters, *as against petitioner,* were not subrogated to the rights of cargo owners, for the reason that the loss was payable and has been paid to the named assured.

2. Intervening underwriters have no right to indirectly recover a moiety of their payments from or at the expense of petitioner, their assured, by entry of a form of decree providing for full recovery of their payments from the "King."

3. Neither under the allegation of fact contained in the intervening petition, nor under the prayer for relief, nor under the stipulated facts, are underwriters entitled to recovery back of a moiety of the moneys they have voluntarily paid petitioner.

4. Any form of interlocutory decree providing for a division of damages on the basis of mutual fault should permit petitioner to recover its uninsured loss in respect of cargo of the "Dixon" and protect its right of indemnity under its policies of insurance.

POINT I.

The insurance policies were contracts between intervening underwriters and petitioner under which petitioner was entitled to be indemnified for the liability which it had assumed under bill of lading and tariff provisions.

The only parties interested in the question under review are petitioner and intervening underwriters. Cargo owners are not interested since they have been paid in full by petitioner. The Interstate Steamship Company is not interested since it required petitioner as owner to answer petitioner's claim as carrier and/or bailee of cargo and by its answer to the petition of intervening underwriters it has protected itself by asking that the cargo damages and costs "be equally divided between the owners of said steamers" (R. 104) with the result that under the holding of mutual fault it can only be called upon to pay a moiety of the cargo damage in any event.

Since intervening underwriters were not parties to the tariffs nor to the bills of lading under which cargo was being transported, these documents are not binding upon them, but they are of aid to determining the reasons for and the nature of the insurance coverage and the intent of the parties in entering into the insurance contract.

It is immaterial as to whether the policy did or did not include a direct insurance on cargo (other than cargo owned by petitioner) since if it was both a cargo policy and a carriers liability policy, petitioner would be entitled to the carriers liability coverage. Even if the insurance was upon cargo and cargo alone, under the doctrine of *Wager vs. Providence Ins. Co.*, 150 U. S. 99, which will be considered later, intervening underwriters were not entitled to recover back the moneys they paid their named assured.

The first question presented is as to whether the policy did insure petitioner's liability to cargo owners which it had assumed by waiving under its tariffs, the saving provisions of the Harter Act, and all other defenses to which it would otherwise have been entitled by law and under the bills of lading which it had issued. There is no question but that it was competent for petitioner to waive the saving provisions of the Harter Act and assume a common law or other liability.

Charles J. Webb & Sons vs. Central RR. Co. of N. J., 36 F. (2d), 702, 704;
Southern Cotton & Oil Co. vs. Merchants & Miners Transp. Co., 179 Fed. 133, 134;
The Gerald A. Fagan, 49 F. (2d) 215;

Marine Transit Corp. vs. Northwestern Fire & Marine Ins. Co., 67 F. (2d) 544;
The Nat Sutton, 62 F. (2d) 787.

Four items seem to have moved both the Courts below to their conclusion, in substance and effect, that the insurance was solely for the benefit of cargo: first, the headings of the tariffs; second, the fact that cargo owners through an increased freight rate paid for the insurance procured; third, the provision in the policy that it was for account of whom it may concern; and fourth, that suit was brought by petitioner "as carrier and/or bailee of cargo" as well as "owner" of the Steamer "Dixon".

The headings "Marine Insurance", "Rates named in these tariffs include Marine Insurance", "Governing Marine Insurance on Rail and Lake Traffic" (R. 78-86) were proper—for, says Commissioner Prouty, *Wyman, Partridge* case (XIII, I. C. C. 258 at 263) who directed the inclusion by lake carriers of the marine insurance clause in the verbiage now appearing in petitioner's tariffs—"In such event (inclusion of the clause) the carrier itself would become the *insurer* and the shipper would require no other insurance." In the light of the *Wyman, Partridge* case further citation of authorities would not seem necessary. It has frequently been held that an agreement to procure insurance or marine insurance imposes upon the carrier the liability of an insurer, or equivalent to that of an insurer.

In *Hill vs. Scott*, (1895) 2 Q. B. 371 (affirmed by the Court of Appeals on the opinion below L. R. (1895),

2 Q. B. 713), a carrier charged a through rate covering all expenses, "including insurance", and in a suit by the shipper to recover for a cargo loss claimed that he was not liable for any loss covered by insurance and that the shipper should look to the insurance company. It was held that the carrier was liable notwithstanding a prior course of dealing under which the carrier had settled with the shipper *after* receiving payment from underwriters, and it was stated (378):

> "I come to the conclusion that the insurance was effected by the defendant for his own protection, and not as agent on behalf of the plaintiff • • •.
>
> "Lastly, I see nothing remarkable in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be necessary; but, where, as here, there is no bill of lading (exception) the shipowner frequently effects an insurance to protect himself against liability."

In *Southern Cotton Oil Co. vs. Merchants & Miners Transp. Co.*, 179 Fed. 133, the bill of lading provided:

> "The freight mentioned in this bill of lading is covered by marine insurance • • • under and in accordance with and subject to the conditions and limitations of policies of marine insurance held by (the carrier)."

After holding that the policies taken out by the carrier did not permit the interpretation of being direct insurance on the goods, but only reinsurance of the carrier's own risk, Judge Learned Hand held the obligation of the carrier under the bill of lading provisions was

> "to pay the shipper's loss under the same contingencies as permitted him through his own *reinsurance* to throw the loss upon his own insurers. This I do not think was *ultra vires* a carrying corporation and did not constitute doing an independent insurance business." (Italics ours.)

In *Gross vs. New York & Texas SS. Co.*, 107 Fed. 516, the carrier agreed for a higher rate of freight to "cover the shipments with marine insurance from Galveston northward." Both the shipper and carrier had taken out policies of insurance and the underlying question was as to which set of underwriters should ultimately bear the loss, but the suit was brought by the shipper against the carrier and recovery could not be made from it unless it were directly and primarily liable. It was concluded (p. 525) that the effect of the clause was to make the goods at the risk of the carrier, and the shipper was permitted to recover.

The *Wyman, Partridge* (*supra*) case granted an increased freight rate to the lake carriers to compensate them for the inevitable losses they would sustain when they assumed full liability to cargo, or to permit them to reinsure such liability. That the shipper paid the insurance premium in the freight rate is therefore no reason for holding that the policies were or were required to be cargo policies; or were solely for the benefit of cargo.

Most marine policies written on or with respect to cargo, after naming the assured, contain the words "for account of whom it may concern" and state that the loss is payable to the named assured "or order". If the named assured has an insurable interest *he is concerned and is insured to the extent of his interest.* Commissioner Prouty in the *Wyman, Partridge* case *supra* says that if the carrier assumed full liability it would acquire "an *insurable interest* in the goods and could take out insurance for its own benefit." (XIII I. C. C. 258 at 262).

In *Phoenix Ins. Co. vs. Erie Transp. Co.*, 117 U. S. 312, a cargo policy had been procured which insured one Charles E. Chase "on account of whom it may concern" (315). Under the contract of carriage the carrier was given the benefit of the shipper's insurance. This Court stated:

> "Any one who has made himself responsible for the safety of goods has a sufficient interest in them to enable him to obtain insurance upon them" • • • (323).
>
> "So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest" (323, 324).

This Court said in *Hooper v. Robinson*, 98 U. S. 528, at 538:

> "A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena v. Crawford, et al.*, 3 Bos. & Pul. 75; s. c. 5 *id.* 269; *Buck & Hedrick v. Chesapeake Ins. Co.*, 1 Pet. 151; *Hancock v. Fishing Ins. Co.*, 3 Sumn. 132.
>
> "In the law of marine insurance, insurable interests are multiform and very numerous.
>
> "The agent, factor, bailee, *carrier*, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, 'on account of whom it may concern,' for all others to the extent of their respective interests, where there is previous authority or subsequent ratification." (Italics ours.)

None of the cases are *contra*.

Since all cargo claims had not been passed, approved and paid, when suit was started, unpaid cargo owners had an action directly against the Steamer "*Willis L. King*" and the Interstate Steamship Company. For this reason the Transit Corporation brought suit as owner of the Steamer and as carrier and/or bailee of cargo, seeking in its own right to recover the amount which it had then paid for cargo damages and as carrier and bailee the amount not at that time paid. This appears from the libel which contains the allegation that the Transit Corporation in "respect of the aforesaid damage to the Steamer "*Dixon*", loss of earnings and use and expenses and *cargo loss and damage*, and as carrier and/or bailee of the said cargo, has sustained damage • • • amounting to $120,000.00" (R. 15). In the stipulation of facts in which the so-called insurance question is presented, it is provided that when further claims in excess of the $22,338.57 referred to above, are received, approved and paid by the Great Lakes Transit Corporation, a further statement or statements will be made and payment will be made in like manner by the underwriters, that is, payment will be made by underwriters to the Transit Corporation (R. 54-5), for the latter's own account. This has been done.

It thus appears that the fact that the petitioner brought suit as carrier and/or bailee of cargo as well as owner of the "Dixon" in no wise supports the conclusion that the policy was direct insurance on the cargo for the sole benefit of cargo owners, and that petitioner was merely an agency to effect such insurance and collect losses.

Consideration will now be given to the opinions of the lower courts which differ radically. Judge West

holding that the policies covered petitioner's carrier's liability and did not cover cargo, and Judge Hicks holding that the policies covered cargo but did not cover petitioner's carrier's liability.

Opinion of the District Court.

Judge West, in his first opinion (R. 105) directed that the decree should be for a moiety of cargo damage against each vessel, and that underwriters "are entitled to enforce the liability of the *'King'* and that of the *'Dixon'*, each for a moiety of the cargo loss." He directed, however, that the decree presented by the proctors for the "Dixon" should be entered. This he later retracted by a letter (R. 105) and in a supplemental opinion (R. 107-8) he concluded, as petitioner reads the opinion, as follows:

> 1. That the tariffs providing "rate • • • include marine insurance" obligated the Transit Corporation to procure cargo policies, and this was not done.
>
> 2. That the policies actually issued cover the legal liability of the Transit Corporation in which coverage cargo owners have no insurable interest.
>
> 3. That coverage of the carriers legal liability is sufficiently broad to include the Transit Corporation's liability for failure to provide cargo insurance, and that as to this coverage cargo owners have an insurable interest, to which intervening underwriters are subrogated.
>
> 4. That cargo owners were entitled to have the protection of cargo insurance as well as that of carriers common law liability, and the carrier having failed to procure cargo insurance could not by paying the loss out of its own funds, take away from underwriters the right of subrogation which they would have had had there been cargo insurance.

Since the Interstate Commerce Commission directed lake water carriers to discontinue procurement of blanket cargo insurance and instead to include in their tariffs "marine insurance clauses" substantially in the form of tariff provisions involved in the case at bar, and also directed the uniform bill of lading be supplemented by adding Section 9 (e), which obligated such carriers to assume liability for perils of the seas where commodities were moving under so-called "insured bills of lading", it is difficult to find any basis in the District Judge's conclusion set forth in item "1" above.

It is likewise difficult to find any basis for the Court's conclusion set forth in Item "3" above. If intervening underwriters did not insure cargo owners, as the Court held they did not, there was no relation, contractual or otherwise, between cargo owners and underwriters. They were in effect strangers to each other, neither of whom could be subrogated to the rights of the other. If petitioner had *agreed with intervening underwriters* to procure cargo insurance which would relieve them of their obligation to pay under the liability policies which they had issued, and if petitioner had failed in that regard, there would be a breach of contract which would justify underwriters in refusing to pay under their policy. No such claim is made or even suggested. Indeed no such contention would be possible since the policy, in effect insuring nothing, would be worthless. Mr. Winter vice president of the Atlantic Mutual Insurance Company intervening underwriter, having the largest interest in his book "Marine Insurance, its Principles and Practices" at page 368. states that it will be found that the ordinary cargo policy usually

contains a provision that cargo underwriters are not liable where goods are in possession of a carrier "who may be liable for such loss or damage by law or under an insured bill of lading, or under a rate of freight that includes insurance." It will be found that the cargo policy to which the rider "First Interest" is attached does contain such clause.

> "Warranted by the assured free from liability for any loss of or damage to goods in the possession of any carrier by land and/or water or in the possession of any other bailee who may be liable for such loss or damage by law, or *under an insured bill of lading, or under a rate of freight that includes insurance;* and free from any liability for goods shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance on such goods." (Italics ours) (R. 61).

Assuming, however, that additional policies had been procured which did not contain the "warranted free" clause referred to above, and that such policies were made payable either directly to cargo owner or to the Transit Corporation as an agent with the limited power of collecting and paying over the insurance, nevertheless, the ultimate liability would be with the intervening underwriter. The procedure would be as follows: first, cargo underwriters would pay cargo owners and would be subrogated to their rights; second, cargo underwriters thus subrogated would bring suit against petitioner which would have no defense and must pay since it had waived the saving provisions of the Harter Act, and assumed full liability; third, petitioner would bring suit against intervening underwriters who likewise would have no defense since under policy provisions they had agreed to indemnify the Transit Corporation to the extent to which it might be liable under

any liability "it shall have assumed, as common carriers, insurers, or otherwise" (R. 65).

Opinion of the Circuit Court of Appeals.

It must at all times be remembered that the word "Assured" in the policy always means the Great Lakes Transit Corporation, not the cargo owner. This appears if an attempt is made to substitute the name of the cargo owner wherever the word "Assured" appears. For example, if "cargo owners" is substituted for petitioner in the indemnity clause, it is meaningless since it would read as follows:

> "The said Assurers (Atlantic Mutual Insurance Co. *et al.*) agree • • • to indemnify • • • said Assured (cargo owners) to the extent • • • which the Assured (cargo owners) may be held • • • under any liability the Assured (cargo owners) shall have assumed as common carrier, insurers or otherwise" (R. 65).

The Circuit Court of Appeals states:

> "As to the second question i. e., whether the *cargo insurance* was payable to the owners of the Dixon as carrier, or as bailee or trustee of the cargo for the owners:
>
> "The gist of the Transit Corporation's answer to the intervening petition was, that the policies of insurance were intended to, and did, insure and indemnify it against liability assumed by it to cargo owners for loss or damage, and that *though the insurers had the cargo owner's right by subrogation against the King* for a moiety there was no such subrogation against the Transit Corporation, since it was this very type of loss against which the insurers had agreed to indemnify it." (Italics ours) (R. 130).

The Transit Corporation by its answer to the intervening petition of underwriters (R. 98, 100) and in

brief and argument at all times contended that the insurance covered its liability and that intervening underwriters *were not subrogated to the rights of cargo owners* but were subrogated to the rights of the Transit Corporation to the extent of the payments made to it.

The Circuit Court of Appeals further states:

> "We think the policies in suit were procured by appellant in compliance with its contracts and were issued *primarily* for the benefit of cargo owners." (R. 132). (Italics ours).

Since the policies were procured in order to place petitioner in funds with which to pay cargo owners, in one sense it might be said that the contracts were issued for the benefit of cargo owners. This would especially be true in New York. There, under the insurance law, Section 109, where there is liability insurance covering damage to property caused by any vehicle, in case of insolvency of the owner of the vehicle can be brought directly against the underwriter. A vessel has been classed as a vehicle under this section.

> *Hinkle vs. Globe & Rutgers Fire Ins. Co.*, 1935 A. M. C. 1330, not otherwise reported, but affirmed 246 N. Y. 737 and 271 N. Y. 585.

The subject of the insurance is contained in the opening clause of the fourth paragraph "on cargo of any kind owned by the assured and *on the assured's liability to others in respect to cargo* of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases" etc (R. 63). Petitioner could not be liable to

itself, and direct coverage of its own cargo (of which there was none on board the "Dixon") moving on its own vessels, was essential. Otherwise the policy speaks solely in respect to petitioner's liability to others.

Consideration will be given to the specific portions of the opinion which the Circuit Court of Appeals states sustain the conclusion that the policy is a cargo coverage. The opinion states:

> "The specific coverage is upon any cargo per vessel sailing from initial port prior to December 12, 1933 midnight (Chicago time) until Great Lakes Transit Corporation's *responsibility* therefor ceases" (R. 132) (Italics ours).

If the policy is a direct coverage on cargo, why should the duration of the coverage be measured by the *responsibility* of petitioner therefor? If the coverage was against carriers liability to others in respect to cargo, the duration of its responsibility therefor was the proper time provision.

The opinion states:

> "Again, the policy provides, 'and also the insurance of said *cargo against perils of the seas and lakes;*' and further, 'and for any and all claims which said *cargo may be called upon to contribute in general average.*'" (Italics ours) (R. 132).

Correctly quoted the excerpt reads:

> "It is agreed • • • that the Assured (Great Lakes Transit Corporation) (are) *taking upon themselves* as to said cargo • • • the *insurance* of said cargo against perils of the seas and lakes • • • and the said Assurers agree and undertake to indemnify and hold harmless the said *Assured* against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts, or misfortunes, to the extent which the Assured may be held liable by the owners thereof under any liability the Assured shall have assumed as common carriers, insurers or otherwise, and for any and all claims which the said cargo may be called upon to contribute in General Average" (R. 64-5).

The Learned Judge, writing in the court below, quotes the following excerpt justifying his conclusion that the coverage was on cargo:

> "Liability under this policy for any loss or losses, claim or claims, arising in respect to each cargo while on board of each of the above named steamers and/or substituted steamers • • • including connecting water conveyances or in respect to cargo while on docks, wharves or elsewhere on shore as the result of any one occurrence is hereby limited • • •" (R. 132).

It will be noted that it is the "*liability*" for "loss or losses • • • arising *in respect to each cargo*", that is limited—not the loss of or damage to cargo.

Again the Court says:

> "There is a provision covering damages to shipments in refrigerators and the usual standard 'sue and labor' clause. It would also seem, as indicated by the District Judge, that the phrase 'on the assured's liability to others in respect to cargo' would protect cargo owners against a breach of appellant's obligation to furnish marine insurance for which the owners had agreed to pay a higher rate" (R. 133).

The use of the expression "*shipments* in refrigerators" (R. 65)—not "commodities" in refrigerators—clearly shows that it was the liability of petitioner for the sound delivery of such shipments, that was insured. Surely there was every reason why underwriters should desire petitioner to sue and labor "for and about the defense, safeguard and recovery of the said cargo, or any part thereof" (R. 66) when its liability to cargo owners and the liability of underwriters to it was measured by the amount of such loss or damage.

It is difficult to understand how the very subject of the insurance, "liability to others in respect to cargo",

(R. 63) could be narrowed to mean a liability for failure to procure direct insurance upon cargo, and nothing more, especially when the Interstate Commerce Commission has held that blanket coverage on cargo would not satisfy tariff provisions.

The Court further states:

> "Appellant relies upon the following clause found in each of the policies:
>
> 'The Assured' (the Transit Corporation) taking upon themselves as to said cargo or parts thereof, * * * the insurance of said cargo against perils of the seas and lakes * * * and the said Assurers agree and undertake to indemnify * * * said Assured * * * to the extent to which the Assured may be held liable by the owners thereof under any liability the Assured shall have assumed as common carriers, insurers or otherwise * * *"
>
> "But this clause does not avail appellant because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Its obligation as to insurance went no further than to require it to procure policies of insurance from others" (R. 133).

In order that the coverage should be full and complete, after the words "common carrier" we find the words "insurers, or otherwise", the underwriters thereby stating to petitioner that no matter what liability is assumed, in so far as cargo loss is concerned, we, the underwriters, will reimburse you.

The *Wyman, Partridge* case (XIII, I. C. C. 258) held that by the marine insurance clauses which it directed (XV, I. C. C. 577 at 581) and were in substance contained in eight of the ten tariffs under which

cargo on the "Dixon" was moving, "the carrier itself would become the insurer and the shipper would require no additional insurance." (XIII, I. C. C. 258, at 262.) This would seem to negative the holding that petitioner did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer. Be that as it may, the policy is a contract between the Transit Corporation and the underwriters. It states that it is *agreed* that the assured (Transit Corporation) are "taking upon themselves as to said cargo the *insurance* of said cargo against the perils of the seas and lakes" and the assurer agreed to indemnify the said assured (Transit Corporation)—"as insurers". (R. 65.) When the parties to a contract both characterize a liability as that of an insurer and one agrees to indemnify the other against such liability, surely the contract is not wholly ineffective because the liability which the parties have in contemplation and have so characterized in their agreement is technically only "equivalent to that of an insurer" (Opinion C. C. at R. 131), and not "as an insurer".

It is therefore submitted that except as to "cargo owned by the assured" the policy was purely and simply a coverage on carriers liability. Even if the petitioner be in error in this regard and the policy was "*primarily*" for the benefit of cargo as held by the Circuit Court of Appeals, (R. 132), surely it *included a carrier's liability coverage.* That intervening underwriters did make payment under the last mentioned coverage is shown by the fact that they paid petitioner by drafts to its order and not by drafts to petitioner as trustee or as carrier and/or bailee for cargo owners. Had petitioner been acting as trustee or bailee for cargo owners it would have waited until it made

collection from underwriters before paying cargo owners. Instead it made payment immediately claim was made and audited. Underwriters awaited proofs of such payment before reimbursing petitioner, thus evidencing that these payments were in satisfaction of its liability to petitioner and not to cargo owners.

Carriers liability policies are very common. Indeed the Interstate Commerce Commission in 1907 anticipated that such insurance would be procured by common carriers when it directed the use of the marine insurance clause now contained in petitioner's tariffs *Wyman, Partridge & Co. vs. Boston & Main RR.*, (XIII, I. C. C. 258 at 262). Mr. Winter of the Atlantic Mutual Insurance Company, in his book on marine insurance referred to above has this to say with respect thereto:

> "There are also liability forms issued to common carriers under which *the insurable interest is not cargo, but the liability, either imposed by law or assumed by contract, of the carriers for cargo in their custody*" (p. 113).
>
> "Transit Floaters • • • Policies by which the interest insured is the liability of a common carrier for loss suffered to property in his custody are sometimes issued. *The subject of insurance is not the property itself, but the liability of the carrier, whether this be implied* by law or assumed by contract. Such a policy is unvalued, the responsibility of the underwriter being limited only by the amount expressed in the policy and not by the value of the property to which the liability relates" (pp. 129, 130). (Italics ours.)

A.

Intervening underwriters having insured petitioner's liability were subrogated to the rights of petitioner and not to the rights of cargo owners, and as thus subrogated they are entitled to recover payments of the cargo damage which it has been decreed the "King" must pay, to the extent they have reimbursed petitioner therefor, and no more.

It is elementary that an underwriter can only be subrograted to the rights of his assured after payment and in the amount thereof.

Liverpool & Great Western SS. Co. v. Phoenix Ins. Co., 129 U. S. 397 at 462.

Chicago etc. RR. Co. v. Pullman Car Co., 139 U. S. 79 at 87.

St. Louis etc. RR. Co. v. Commercial Ins. Co., 139 U. S. 223 at 235.

Wager v. Providence Ins. Co., 150 U. S. 99 at 108.

Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 175 U. S. 91 at 96.

Luckenbach v. W. M. McCahan Sugar Rfg. Co., 248 U. S. 139 at 146.

Having reimbursed petitioner for the amount of cargo loss and damage (less deductible average), intervening underwriters are entitled to be subrogated to petitioner's rights, to wit: the right to receive the portion of the loss and damage which it has been decreed that the "King" must pay (less one-half of the deductible average), and no more.

B.

Even though the policy be construed as a coverage on cargo alone, petitioner, the named assured, having an insurable interest therein, was entitled to the benefit thereof, and intervening underwriters as against petitioner were not subrogated to the rights of cargo owners for the reason that the loss was payable and has been paid to the named assured.

That petitioner had an insurable interest in the cargo of the "Dixon" cannot be questioned.

Hooper vs. Robinson, 98 U. S. 528 at 538.
Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312 at 323-4.

Even if the policy can be construed as one solely upon cargo, the case would then come squarely within the doctrine of *Wager v. Providence Ins. Co.*, 150 U. S. 99. There, open policies had been issued to Morse & Co. "for account of whom it may concern." Morse & Co. had assumed the obligations of a carrier. Certificates of insurance under these open policies were issued to Morse & Co. and endorsed to the order of the cargo owner, and after a loss had occurred for which the carrier was liable, the insurance company paid the amount of the policy to the cargo owner. The insurance company then brought suit against Morse & Co. and against Wager, master of the vessel, to recover the amount so paid.

This court pointed out that if as theretofore held by it a carrier by agreement could have the benefit of a shipper's insurance, he surely was entitled to a like benefit if the insurance was made payable to the carrier or his order. We quote (108-9):

"But it is equally well settled that the right, by way of subrogation, of an insurer, upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier. *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312; *St. Louis, Iron Mountain etc. Ry. v. Commercial Union Ins. Co.*, 139 U. S. 223.

"If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, *the underwriter can have no right to recover over against the carrier*, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier." (Italics ours.)

This Court further held:

"H. Morse & Co. were, nominally at least, the parties insured and came within the terms of the policy, and upon a loss, were entitled to receive the amount of the policy, and *of course, in that event, the insurers could not, after having paid H. Morse & Co. the amount of the loss, recover it back from them under the principle of equitable subrogation.*" (Italics ours:)

The Court then found that no different conclusion should be reached because of the fact that the insurance companies paid the amount of the loss directly to the cargo owners. In the *Wager* case the bills of lading did *not* contain any provision giving the carrier the benefit of the shipper's insurance (the first head-

note to that case being misleading) and in every respect the decision is in point on the issues here involved.

To the same effect as the *Wager* case are:

The John Russell, 68 F. (2d) 901;
Sorenson vs. Boston Ins. Co., 20 F. (2d) 640;
Gross vs. New York & Texas SS. Co., 107 Fed. 516; 521.

See also discussion in:

Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312 at pp. 320-325.

In the case of *Lowery vs. Connecticut Fire Ins. Co.*, 70 F. (2d) 324, cited by Judge West in his supplemental opinion, (R. 107) the question was as to whether a vessel owner not named in a liability policy was entitled to the benefit of insurance issued in the name of the charterer, who was the carrier of the cargo. The obligation of the underwriters to indemnify the *carrier*, named as the assured in their policies, was admitted.

The District Judge cites the *Wager* case (R. 108). He held in effect that had there been cargo insurance the *Wager* case would have been applicable, but since the basis of petitioner's liability and underwriters' subrogation was petitioner's failure to procure such insurance, the *Wager* case was inapplicable. The fallacy of this conclusion is pointed out above. Although it was urged before the Circuit Court of Appeals, both in the original brief and argument and in petition for reargument, that the *Wager* case was controlling, no mention of it is made in the opinion nor has any attempt been made to distinguish it in briefs

or arguments of counsel for intervening underwriters. It is submitted that it is controlling.

POINT II.

Intervening underwriters have no right to indirectly recover a moiety of their payments from or at the expense of petitioner, their assured, by entry of a form of decree providing for full recovery of their payments from the King.

The right of subrogation is an incident of the doctrine that the assured shall be indemnified, but shall never be more than fully indemnified, for loss; and in applying the rule the broadest equities should be sought (*Joyce, The Law of Insurance*, 2d Ed., Secs. 29, 3537). Having no right of direct recovery against their own assured, intervening underwriters surely cannot indirectly effect such a recovery upon principles of subrogation. "In any form of remedy the insurer can take nothing by subrogation but the rights of the assured." *Phoenix Ins. Co. vs. Erie & Western Transp. Co.*, 117 U. S. 312, 321.

No technical rule of law requires that such a result be accomplished by entry of a decree, in the first instance, providing for the recovery by underwriters of the full amount of their payments from the "King," thus giving the "King" a right of recoupment or offset against petitioner. Where, as here, there is a direct liability of the carrying vessel to her cargo for loss due to mutual fault of the carrying vessel and a non-carrying vessel, the rule is the same as in the case of suit by the owner of a third ship or other innocent party damaged by the collision. The non-carrying vessel is pri-

marily liable for but a moiety of the damage, and only in case the innocent party is unable to enforce payment of the full moiety from one of the offending vessels may the deficiency be recovered from the other.

The Alabama and the Gamecock, 92 U. S. 695;
The Virginia Ehrman, 97 U. S. 309;
The City of Hartford, 97 U. S. 323;
The North Star, 106 U. S. 17;
The Sterling and the Equator, 106 U. S. 647;
The Beaconsfield, 158 U. S. 303;
The Hudson, 15 Fed. 162;
The Doris Eckhoff, 41 Fed. 156;
11 Corpus Juris, page 1173, Sec. 265; page 1216, Sec. 351.

The only situations in which an award may be made for the full amount of such loss as against one of the offending vessels are: (1) Where all the parties are not before the court (as in "*The Atlas*," 93 U. S. 302); or (2) where by reason of the Harter Act or other statutory provision, not waived by the carrying vessel, there is no liability on the part of the carrying vessel to her own cargo for the damages resulting from the collision (as in "*The Chattahoochee*," 173 U. S. 540); "*The North Star*," *supra*; "*The Toluma*," 72 F. (2d) 690; *New York & Cuba Mail SS. Co. v. American SS. Owners, etc., Co.*, 72 F. (2d) 694.

In the "*Grecian-City of Chattanooga*," 8 Fed. Supp. 380, there was a collision due to mutual fault, in which the "Grecian" and her cargo became a total loss. The value of the "City of Chattanooga" was sufficient to take care of all possible claims. The owner of the "Grecian" as owner and as bailee of her cargo, brought suit against the "City of Chattanooga" and her own-

er, to recover for the loss of ship and cargo. The cargo was being transported under a tariff filed with the Interstate Commerce Commission which was headed "Rates Include Insurance" and which provided that the cargo while water borne was insured against perils of the seas, etc. Exceptions to the libel were filed. The District Court held that the Harter Act was not waived and that libellant was entitled to a full recovery against the "City of Chattanooga" under the doctrine of *"The Chattahoochee," supra.* The Circuit Court of Appeals, 78 F. (2d) 657 reversed; stating:

> "Certain legal principles of general application to the right of recovery for cargo damage resulting from the collision of two vessels due to the fault of both are both well established and undisputed by these parties. • • • Moreover, when the provisions of the Harter Act (46 USCA Secs. 190-195) do not apply, the cargo owner, entitled to a recovery against both vessels at fault, may not recover a judgment in solido against both for his whole damage with the right to an execution against either as at common law for his whole damage but only a judgment against each for a moiety of the damages with the added secondary liability of each for the other's share. *"The Hudson"* (D. C.) 15 F. 162; *"The Sterling"* and *"The Equator,"* 106 U. S. 647, 1 S. Ct. 89, 27 L. Ed. 98. And this principle holds true where a shipowner sues as bailee of her cargo. *"The Doris Eckhoff"* (D. C.) 41 F. 156. *Thus it will be seen that the decisive question upon this appeal is whether the libelant by its contract of carriage waived the provisions of the Harter Act."* (660.) (Italics ours.)

The Court concludes:

> "Nevertheless, under its agreement in the bills of lading that the cargo of the "Grecian" was in-

> sured, the libelant was bound at least to place and, in case of loss, to collect and pay over the insurance to the cargo owners. That is to say, the libelant was bound either to deliver the cargo safely or, if it failed to do that, to deliver the insurance to the cargo owners instead. This was its liability to cargo for loss while the goods were water-borne. For present purposes it differs little from a direct assumption by the libelant, of an insurer's liability for sea perils." (662.)

The case was tried and upon a second appeal (85 F. (2) 102), the prior decision was affirmed. Petition for certiorari was denied by this Court (299 U. S. Advance Sheets 1, p. XXVI). It should be noted that the particular tariffs involved in the "Grecian-Chattanooga" litigation did not, as do eight of the ten tariffs in this case, contain a specific assumption of liability for marine perils. Nevertheless the appellate court held that this did not affect the result, as is shown by the excerpt quoted above. The decision was based upon the ground that upon occurrence of the cargo loss the carrying vessel, by reason of contract provisions, was liable for the amount of the loss; and, because of that liability, only a moiety of the cargo loss could be recovered from the non-carrying vessel. The "Grecian-Chattanooga" case had solely to do with the effect of the tariff provisions under which the cargo on the "Grecian" was moving. The construction of the insurance policy with respect to the cargo of the "Grecian" was not under consideration by the Court. The decision of the Circuit Court of Appeals that under the tariffs issued by the owner of the "Grecian" the saving provisions of the Harter Act were waived by the carrying vessel, fully disposes of the contention of intervening underwriters

that they are entitled to a full recovery against the "King."

Opposing counsel in the courts below relied upon the statement of this Court in *Erie R. R. Co. v. Erie & Western Transp. Co.*, 204 U. S. 220, that "the contract relations between the 'Conemaugh' and her cargo have nothing to do with the case." The suit then before the Court was a separate action for recoupment by the owner of the non-carrying vessel after it had been compelled to pay the entire damage to cargo of the carrying vessel. The history of the litigation is shown by the decisions of the Supreme Court in *"The New York,"* 175 U. S. 188; *Ex Parte Union Steamboat Co.*, 178 U. S. 317; *Union Steamboat Co. v. Erie & Western Transp. Co.*, 189 U. S. 363. In the prior litigation this form of decree was entered solely by reason of the failure of the owner of the "New York" to present the facts upon which its contentions were based, either by impleading the "Conemaugh" under the admiralty rule or by answer. The opinion of the Circuit Court of Appeals (108 Fed. 102), affirmed by this Court in Union Steamboat Co. v. Erie & Western Transp. Co. *(supra)*, clearly shows the exact situation. It is there said:

> "The cargo underwriters, having proceeded only against the 'New York,' were entitled to recover their full damages against it as the only vessel impleaded.
>
> "If the 'New York' had availed itself of admiralty rule 59, as was done in the case of *'The Beaconsfield,'* 158 U. S. 303, 307, 15 Sup. Ct. 860, 30 L. Ed. 993, and brought in the 'Conemaugh' as a vessel in fault, which also ought to be proceeded against for cargo losses, the question of the liability of that vessel to cargo underwriters would

> have been presented *and the cargo damages would have been divided, if it had been found that that vessel was also in fault for the collision, and had no valid special stipulations in her bills of lading relieving her from liability to cargo underwriters.* But this course was not taken. By neither cross bill, petition nor answer was this question of the 'Conemaugh's' liability to cargo underwriters presented. Nor does it appear that the question of recoupment, now raised by an assignment of errors upon the decree of the district court, was ever presented to that court by any form of pleading." (Italics ours.)

In the present case the owner of the "King" has impleaded the owner of the "Dixon" under the 56th Admiralty Rule to answer the latter's libel, in so far as the cargo claim is concerned, (R. 23) and in its answer to the intervening petition of underwriters has asked that its rights be preserved and that the decree against it be limited to a moiety of cargo loss and damage (R. 101, 104).

As between the two vessels, therefore, the "King" and the "Dixon" would each be primarily liable for a moiety of this cargo loss, in case of mutual fault. However, petitioner is here concerned not with rights of recovery by cargo owners (whose claims have been settled in full by petitioner), but with rights as between petitioner and its own underwriters, after payment of such cargo claims by petitioner and reimbursement by underwriters. Since underwriters cannot recover from their own assured, their only possible interest is to be subrogated, to the extent of their payments, to the right of petitioner to recover the moiety of such cargo losses for which the "King" remains liable.

POINT III.

Neither under the allegations of fact contained in the intervening petition, nor under the prayer for relief, nor under the stipulated facts are underwriters entitled to recover back of a moiety of the moneys they have voluntarily paid petitioner.

The intervening petition of Atlantic Mutual Insurance Company alleged that it had paid and would pay $6041.57 to petitioner for account cargo, and that it was subrogated to the rights of cargo owners in that amount (R. 45.) Underwriters' right to subrogation has been discussed above and the discussion will not be repeated here. The prayer for relief was "that the court would be pleased to decree to your petitioner *against the Interstate Steamship Company and against the steamer "Willis L. King"* the sum of $6041.57." (R. 46.) This was the full amount the Atlantic Mutual Insurance Company had then paid and would thereafter pay with respect to cargo damage. Both the District Court and the Circuit Court of Appeals correctly held that each of the colliding vessels was liable for a moiety of cargo loss and damage.

It was stipulated that underwriters voluntarily paid petitioner individually and not as carrier and/or bailee for cargo, the amount shown by the general average adjustment, and agreed to pay petitioner individually the balance of cargo loss and damage after the amount thereof had been ascertained and paid by petitioner to cargo owners (R. 52-4). The stipulation was filed after the intervening petition was entered into and filed and the issue as between intervening underwriters and petitioner framed (R. 49). Agreement as to future pay-

ments was an affirmation that prior payments were proper, and that the future payments were required. In effect, intervening underwriters said, it is essential to our case to prove that we are subrogated to the rights of cargo owners and that we are entitled to recovery in full from the "King." Failing upon either question, we are not entitled to recovery at all.

No fraud or mistake or lack of knowledge of the facts has been claimed, nor do we anticipate that such claim will be made in this court. In the absence of an allegation and proof of fraud or mistake, underwriters having full knowledge of all the facts cannot recover back the moneys they have voluntarily paid petitioner.

Lamborn vs. County Commissioners, 97 U. S. 181;
U. S. vs. Wilson, 168 U. S. 273;
48 Corpus Juris, 734;
U. S. v. William Edmonston, 181 U. S. 500.

The opinion of the Circuit Court of Appeals dismisses petitioner's urgency that there was no basis for a *recovery back*, in the following language:

> "This objection is without merit for appellant treated the intervening petitions as a sufficient basis for relief and stipulated the facts for the express purpose of permitting the court to pass upon the rights of the intervening underwriters 'in so far as concerns the form of interlocutory decree to be entered.'" (R. 134.)

Surely it is a far cry to hold that a stipulation of fact in which voluntary payment is admitted, no fraud or mistake is claimed, and which is entered into for the purpose of permitting the court to pass upon the rights

of intervening underwriters "in so far as concerns the form of interlocutory decree to be entered", permits a litigant to recover back such voluntary payment upon a theory never presented in pleading, proof or argument. The stipulation of fact was made to enable the court to render a decree upon the issues presented by the intervening petition and this petitioner's answer thereto.

It is submitted that the court's decision that the objection of petitioner discussed above "is without merit", is incorrect.

POINT IV.

Any form of interlocutory decree providing for a division of damages on the basis of mutual fault should permit petitioner to recover its uninsured loss in respect of cargo of the "Dixon" and protect its right of indemnity under its policies of insurance.

If such an interlocutory decree contained a provision permitting intervening underwriters to recover one moiety of their payments from the "King," their rights would be completely protected.

Cargo owners whose claims have been paid have no further right or interest in this proceeding and no appearance of counsel has been entered herein on their behalf. Undoubtedly all such claims will be paid prior to the entry of final decree but the rights of any cargo owners who have not been paid at the time of entry of interlocutory decree would be completely protected by a proviso in the interlocutory decree stating that it was

entered without prejudice to the rights of petitioner as carrier and as bailee of cargo, as such rights might exist at the time of entry of final decree.

The rights of petitioner have been completely ignored in the decree entered. Not only is it compelled to refund moneys paid to it by its own underwriters, but it was even denied any recovery of its uninsured loss in respect of cargo, that is, the $1000 deductible average for which it was not and will not be reimbursed by underwriters under the policies. As to this amount it is entitled in its own right to recover a moiety from the "King." It is also entitled to recover from intervening underwriters a proper proportion of the expenses incurred by it in maintaining the litigation against the "King."

In Conclusion.

The decree of the District Court should be reversed in so far as it decrees any recovery in favor of the Atlantic Mutual Insurance Company and other similarily situated underwriters, against the Great Lakes Transit Corporation or its Steamer "*George D. Dixon,*" and in so far as it directs that the said underwriters shall recover from the Interstate Steamship Company or the Steamer "*Willis L. King*" any sum in excess of a moiety of the amount for which said underwriters have reimbursed and will reimburse petitioner for payments it has made and will make to cargo owners for cargo loss and damage up to the time of the entry of the final decree herein; together with costs in favor of petitioner and against said underwriters in this court and the courts below; and with instructions that the interlocutory decree contain a proviso that it is entered

without prejudice to petitioner's rights as carrier and/or bailee of cargo with respect to claims of cargo owners whose claims have not been paid at the time of the entry of final decree.

Dated March 24, 1937.

Respectfully submitted,

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